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May 26, 1992

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: CC Docket No. 92-90
Proposed Rule to ~~Implement~~
the Telephone Consumers Protection Act of 1991

To Whom It May Concern:

Attached are one original and nine copies of the Comment submitted on behalf of the American Collectors Association to be formally filed pursuant to Rules 47 C.F.R. § 1.415 and § 1.419.

Sincerely,

Basil J. Mezines

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

The Telephone Consumer Protection Act of 1991

CC Docket No. 92-90

COMMENT OF THE AMERICAN COLLECTORS ASSOCIATION

AMERICAN COLLECTORS ASSOCIATION
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Comment of the American Collectors Association

Introduction

The American Collectors Association (ACA) is an international organization of approximately 3,600 debt collection service companies. ACA members work on behalf of more than one million credit grantors in the collection of retail, professional and wholesale accounts receivable. ACA member firms make hundreds of thousands of calls per day involving a daily aggregate average of accounts receivable measurable in hundreds of millions of dollars. Taken as a whole, U.S. collection agencies handled between $70 and $80 billion in placements last year.

Increasingly, collection accounts are serviced by the use of automated dialing systems. The enormous increase in productivity and cost reduction engendered by this technology not only increases competition within the collection industry but makes it increasingly cost-effective to service relatively small accounts held by smaller credit-issuing firms. It is now possible for small businesses or small medical and dental practices to collect accounts that once were too costly to pursue. More efficient, less costly debt collection has the effect of lowering the cost and risk of doing business for many businesses and professions.

ACA greatly appreciates the concern and evenhandedness shown by the FCC with respect to balancing complex economic concerns in the face of the powerful and clear mandate of Congress to protect the privacy interests of the public against abuses of new telephone technology. The comments by the Commission in the notice of proposed rulemaking have been consonant with the concerns of the Congress for telephone subscriber privacy as reflected in the legislative history and with the concerns expressed by the President in his signing statement with respect to minimizing adverse impacts on existing business practices.

Exemptions from the TCPA for Debt Collection Calls

ACA endorses the analysis by the FCC with respect to application of subsections 64.100(c)(2) and (3) of the proposed rule to debt collection calls. Under section (c)(2) an exemption exists where there is a clear existing business relationship, such as exists between an employee or agent of the credit-issuer and a credit-using customer. Section (c)(3) exempts debt collection calls made by an independent contractor. The regulation does not require a preliminary hair-splitting analysis of the business relationship between the collector and the debt holder (as is sometimes the case under the Fair Debt Collection Practices Act). Rather, the existence of the debt combined with an absence of attempted solicitation is sufficient to invoke the exemption.

This is a very sound approach. It may have been difficult or problematic to try to rely solely on an assertion that all debt collection practices fall under the rubric of "existing business relationships" because of the variety of business relationships which give rise to collection activities. The same collection firm may operate as agent, employee, assignee or independent contractor depending on which account is being serviced at any given time. Conversely, if the regulations had been drafted so as to require a different set of practices pursuant to different contractual, agency or business arrangements, the result would have been enormous cost and confusion.

Furthermore, a narrow or incomplete exemption for debt collection calls would have a considerable adverse economic impact. Large retail firms and banks with in-house collection departments are already exempt from the Fair Debt Collection Practices Act, unlike independent collectors. Had the regulations promulgated under the TCPA narrowly construed "existing business relationships" while failing to provide an exemption for collections by independent collectors or assignees, then the cost of collections for these large credit issuers would remain the same while the cost of collections by independents would greatly increase. Therefore, firms too small to establish in-house collection departments would become marginally less competitive. Enterprises such as dental or medical practices and hospitals often contract for the services of independent collection firms who in turn rely heavily on automated telephone technology to make collection service affordable to smaller credit-issuing firms and enterprises. Therefore, restrictions on cost-saving technology such as predictive dialing would inflict disproportionate harm on smaller credit-issuers and holders of small accounts.

The FCC has proposed development of a broad exemption for debt collection under § 227(b)(2)(B)(ii) with respect to commercial calls not adversely affecting privacy rights and which do not include the transmission of unsolicited advertisements. This exemption is in addition to the category of "existing business relationships." This

broader, two-provision approach should address the concerns of those who may have feared that sole reliance on an expanded definition of "existing business relationship" might be construed as artificially establishing an agency relationship where none was intended to exist. On the contrary, it appears clear that this regulation has been structured in this fashion precisely because not all collection activity is done in the context of an express agency relationship.

Current Uses of Predictive Dialing by Collectors

In an effort to enhance productivity, quality of service and efficiency, more and more collection firms now rely on "predictive dialing" systems. These systems do not replace human operators but permit a more efficient use of the operator's time by automating both the task of dialing and the task of call-specific data retrieval. The "predictive" aspect is in the fact that the system attempts to place calls at a pre-selected time interval during which time the caller is expected to complete the previous call.

Some systems are more advanced insofar as the system tracks the actual performance of the caller and adjusts the time interval accordingly. Even more advanced systems can detect answering machines, and messages indicating disconnected or changed numbers.

However, even with the most advanced systems, the situation arises in which a call is connected before the operator can complete the prior call. If the system simply were to hang up because no operator is available, then the answering party is left with the annoyance or possibly disturbing uncertainty of an unidentified call. If the system leaves the party on the line with no message or indication of any kind for more than a few seconds, the answering party is likely to hang up.

To avoid delay-related problems, most predictive dialing systems used by collectors deliver a recorded message to the answering party which asks the party to hold for a moment. As an adjunct to predictive dialing, this automated recorded message functions solely for the purpose of alerting the answering party that the caller will be delayed a few moments before coming on line. The message conveys no other information.

"Hold" messages are not solicitations or otherwise content-related

ACA believes that this kind of recorded message which functions solely as a functional adjunct of predictive dialing is distinct from prerecorded messages with informational or solicitation content. Prerecorded messages made for the purpose of conveying information, sales solicitations or other uses in which delivery of the contents

of the recorded message is itself the purpose of the call are not the equivalent of "please hold" or "all operators are busy" or "one moment please."

Section 64.1000(d) of the proposed regulations requires that at the beginning of an "artificial or prerecorded telephone message," that the message shall "state clearly the identity of the business, individual, or other entity initiating the call" and that a phone number or address of the caller be given during the message. This language is drawn directly from § 227(d)(3)(A) of the TCPA.

ACA believes that § 227(d)(3) of the TCPA was clearly directed at the use of "artificial or prerecorded voice systems" as distinct from the requirements applicable to automated dialing. However, section (d) of the proposed regulation is entitled "Automatic Dialing Devices; identification of the caller" even though the requirements are drawn from § 227(d)(3)(A) of the Act.

As ACA understands the major objectives of the TCPA, the Act is primarily intended to ban indiscriminate random dialing by automated dialers, to eliminate practices which cause line seizure, to ban unsolicited prerecorded commercial solicitations, and regulate the content of permissive prerecorded solicitations and messages. While there is considerable overlap between the objectives and the means to achieve them, there are clear distinctions in the Act with respect to auto-dialing and

automated voice systems. These distinctions are not entirely clear in the regulations as proposed.

ACA is concerned that it may be possible to interpret the proposed regulations such that the effectiveness of the exemption for debt collection created by section (c)(2) and/or (c)(3) may be undone in part by section (d). In particular, the requirement in section (d) of self-identification within a functional "please hold" message may impose duties which conflict with those imposed under the Fair Debt Collection Practices Act.

Proposed § 64.1100(d) and the Fair Debt Collection Practices Act

Debt collectors subject to the Fair Debt Collection Practices Act (FDCPA) are prohibited from conveying any information to third parties, even inadvertently, with respect to the existence of a debt owed. 15 U.S.C. § 1629b-c, Pub. L. 95-109 § 804, 805, 91 Stat. 874 (Sept. 20, 1977). The FDCPA requires a collector initiating a call answered by a third party to identify himself by name but not disclose the name of his employer unless asked. 15 U.S.C. § 1629b(1). Usually, the collector may not contact a third party a second time unless asked to do so. 15 U.S.C. § 1629b(3). Generally, the existence of the debt cannot be disclosed. 15 U.S.C. § 1629b(2). For example, in the context of mailed communications, the Act goes so far as to prohibit the display of any word, symbol or logo or company name on the outside of a mailed envelope which

indicates to a third party that the letter was sent in reference to a debt collection. 15 U.S.C. § 1629b(5).

For this reason, a collector must take steps to identify the answering party before proceeding with any call related to a debt. A prerecorded message which has the effect of inadvertently revealing debt-related information to a third party such as a house guest, family member or roommate could constitute a violation of the FDCPA.

The Commission has noted in footnote 23 of the notice of proposed rulemaking that the problem of self-identification under the FDCPA has been brought to its attention by the debt collection industry. The footnote goes on to state:

> **"The extent to which a message improperly identifies the caller under the Fair Debt Collection Practices Act is a question best addressed by the agency charged with administering that act -- the Federal Trade Commission. However, our tentative reading of the Fair Debt Collection Practices Act indicates that debt collectors should be able to draft identification messages that comply with both statutes."**

ACA recognizes that the Federal Communications Commission cannot speak for the Federal Trade Commission with respect to interpretations of the Fair Debt Collection Practices Act. Nor does ACA believe that it is necessarily impossible to comply with the requirements of both the TCPA and FDCPA with respect to caller self-identification. Our concern is that we may nevertheless be subject to needlessly redundant or even conflicting requirements under the two statutory programs. It would

not be a violation of respective agency jurisdictions for the FCC to determine that compliance with the requirements of immediate self-identification currently imposed on collectors by the FDCPA is sufficient to satisfy the requirements of the TCPA with respect to calls made by a live operator aided by an auto-dialing system which periodically issues "please hold" messages.

If the proposed regulations came to be interpreted as a requirement that the currently used "please hold" message must include the name of the collection agency, a situation could arise in which an inadvertent unlawful disclosure was deemed to have occurred. Conversely, if an operator becomes available to take the call before such a prerecorded message runs in its entirety, the operator's interruption of the message could conceivably violate the self-identification requirements in section (d) of the proposed rule. This would seem an unreasonable interpretation of section (d). If it is, therefore, lawful to interrupt a taped message in order to state exactly what the tape would have said (i.e., "hello, my name is.."), then there is no need for a requirement of a recording which will state what the operator is already legally obligated to say once he or she comes on line.

A debt collector caller is already subject to detailed self-identification requirements under the FDCPA. In the context of debt collection, an automated "please hold" message is followed by immediate voice contact with a live operator who is already obligated under the FDCPA to identify himself by name to all answering parties and by company affiliation to the debtor and to any third party contacted for information purposes who asks about the caller's affiliation. 15 U.S.C. § 1629b(1).

ACA concludes from the Commission's comment in footnote 23 that the word "or" as it appears in section 227(d)(3) of the TCPA and in section (d) of the proposed rule ("...business, individual, or other entity initiating the call...") means that a collector using a prerecorded message has the option of identifying only himself or only his employer. If that provision had been taken to mean that the caller who prepares a prerecorded message must identify his employer unless the initiating entity is the individual caller himself rather than an agent or employee of another, then it may not be possible to comply with both the TCPA and the FDCPA. The identity of the collector's employer is not to be given to third parties who may answer a collection call unless the third party specifically asks. 15 U.S.C. § 1629b(1). A prerecorded initial disclosure of the name of the collection firm could constitute a violation of the FDCPA under some circumstances.

ACA believes that the regulations in the proposed § 64.1100(d) should more clearly reflect the existing distinctions in the TCPA with respect to auto-dialing and automated message delivery systems, or at the very least, the FCC should make it clear that where the use of prerecorded messages is limited solely to purely functional extensions of the auto-dialing process rather than content-based message delivery, that the requirements of § 64.1100(d) do not apply.

In the context of debt collection, a caller subject to and in compliance with the requirements of the Fair Debt Collection Practices Act should be deemed to have complied with the self-identification requirements in § 64.1100(d) where the caller's unrecorded self-identification promptly follows a prerecorded "hold" message which delivers no other information other than the request that the answering party hold momentarily.

Automated Interactive Systems

Increasingly, debt collectors use fully automated systems to deliver or solicit information. Again, in order to comply with the requirements of the FDCPA, the operation of these devices must be tailored to avoid unlawful disclosures. In most cases, this is done by a preliminary step in which the answering party is asked to indicated (by pressing a button) whether he or she is a named party. If the called party

is not the debtor, this step can screen out inappropriate disclosures. Once this step is completed, an appropriate self-identification by the caller is made as mandated by the FDCPA. Because the self-identification is made before any transmission of or request for information, this practice is consistent with the goals and requirments of both the TCPA and FDCPA.

Line Seizure and the 5-second Hang-up Requirement

ACA has concerns about § 68.318 of the proposed regulation. We ask the Commission to give us some additional guidance as to the meaning of "the time notification is transmitted." For example, when the answering party hangs up on a recorded message, that act has the effect of sending a hang-up message to the central phone office. After some delay depending on the quality of the switiching equipment (as long as 15 seconds in the case of offices using some older, non-digital technologies) the central phone office then transmits a hang-up message to the calling system. However, if the answering party waits 5-seconds and then checks to see if the line is clear, he will find that it is still engaged--not because the caller failed to hang up but because the notice has not been transmitted to the caller yet. Furthermore, by picking up the phone the answering party may have restarted the clock with respect to the process of transmitting the hang-up message. ACA can easily foresee circumstances in which automated callers will be unjustly accused of having violating the 5-second

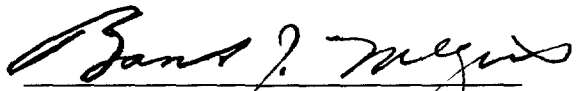
rule simply because an offended answering party repeatedly hung up and rechecked a line connected through a phone company office unable to respond promptly to the initial hang-up message.

Additionally, it is not entirely clear what "transmitted to the system" means for purposes of timing the duration. If notification is sent but not received by the automated system has the 5-second clock started? What responsibilities does the system operator have with respect to insuring that such notification is always received by the system? A number of ACA members have invested tens or even hundreds of thousands of dollars in automated equipment. Before additional significant investments are made to acquire or modify hardware and software, we want to be sure these devices will conform to all applicable FCC regulations.

Time of Day Restrictions

ACA wishes to note for the record that in the notice of proposed rulemaking, it was incorrectly stated in paragraph 33 that the Fair Debt Collection Practices Act restricts collection calls to the period between 9 AM and 9 PM. In fact, the time of day in which a collection call is not presumptively inconvenient is anytime between 8 AM and 9 PM. 15 U.S.C. 1692c(1).

The imposition of a time-of-day restriction more narrow than that permitted under the FDCPA would be a hardship in some circumstances and would undo or conflict with extensive legislative, administrative and judicial reflection as to what constitutes an "inconvenient" or "unusual" time of day.



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